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IN THE

Supreme Court of the United States

October Term, 1940

No. 728

MAY DEPARTMENT STORES COMPANY, a New York Corporation, and JERRY GODDORD,

Petitioners,

vs.

TAKASHI KATAOKA, by his Guardian *ad Litem*, TSUTOMU KATAOKA, and TSUTOMU KATAOKA,

Respondents.

Brief of Respondents in Answer to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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Brief of Respondents in Answer to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your respondents are convinced that a review of this case would only result in affirmance and in delay and expense though if the jurisdictional defect were such that it could be so cured that a consideration of the merits might be had in this Court, justice would be served.

Throughout, unless otherwise indicated, italics are ours.

The Matter Involved.

The complaint comprises two related matters, stated in three counts. The first two counts seek the same recovery for the same injury from the same defendants, resulting from the identical situation and facts.

Paragraph XIII of the *first* count is as follows:

"XIII.

"That by reason of the negligence and carelessness of the defendants and *each of them*, as aforesaid, and as a proximate consequence thereof, the said plaintiff minor not only lost the two fingers as aforesaid, but has completely and permanently lost the normal use and function of said right hand; has suffered excruciating pain, received a profound shock to his nervous system, and his capacity for labor and for the enjoyment of life will be seriously and permanently impaired, all to his damage in the sum of Fifteen Thousand and No/100 ($15,000.00) Dollars. (5)"

Paragraph III of the *second* count is as follows:

"III.

"That by reason of the negligence of the defendants, and *each of them*, and as a proximate consequence thereof, the said plaintiff minor not only lost the two fingers as aforesaid, but has completely and permanently lost the normal use and function of said right hand; and has been left with a permanent deformity; has suffered excruciating pain, received a profound shock to his nervous system, and his capacity for labor and for the enjoyment of life will be seriously and permanently impaired, all to his damage in the sum of Fifteen Thousand and No/100 ($15,000.00) Dollars."

In the third cause of action, the father of the child seeks to recover for medical expenses.

It should be observed that in paragraph V of the first cause of action, which is also incorporated in the second cause of action, it is alleged:

"V.

"That *at all times* herein mentioned the defendant Jerry Goddord was the duly appointed, qualified and acting agent, servant and employee of the defendant, The May Department Stores Company, a corporation, and *as such was acting within the scope* of his employment for said corporation."

In the petition it is stated that the answer *admitted* by failure to deny that the defendant Jerry Goddord was its employee, "acting within the scope and course of his employment." (Petition, p. 5, center.)

The complaint charges that the defendant Jerry Goddord, the servant of the defendant May Company (acting "within the scope of his employment for said corporation" —the defendant May Company), after the child's hand was caught in the escalator, attempted to remove the hand by pulling on it, but to no avail, and finally stopped the escalator, which action likewise failed to release the hand —whereupon the defendant Jerry Goddord threw the escalator into reverse, and as he did so the escalator clipped off the third and fourth fingers of the child's right hand; and the complaint further alleges that Mr. Goddord did not summon anyone having knowledge of the mechanics of said escalator to aid in removing the child's hand. In paragraph XIII, the complaint alleges that the loss of the fingers was due to the "negligence and carelessness of the defendants, and *each of them.*"

The first cause of action is not predicated on the mere fact that the store was equipped with an escalator; but, upon the *failure to exercise the care* in its use which the nature of the machine, its potentialities of disaster to little children required in a situation which included among other negligences the failure to provide an attendant to guard little children normally present in large numbers in the children's clothing department of a large store.

In the second cause of action there is included the allegations we have above stated, and also:

"II.

"That the loss of said plaintiff minor's fingers was due to the carelessness and negligence of the defendants and each of them in maintaining, operating, conducting and supervising the said escalator, and to the carelessness and negligence of defendants' agent and servant, Jerry Goddord, in attempting to remove the said minor's hand after it had been inserted into said aperture, and by failing to summon an expert who had working knowledge of the said escalator to release the said hand."

Notwithstanding these allegations and that admission of the answer that Mr. Goddord was acting within the scope of his employment, petitioners state:

"There is, however, still no allegation that the defendant Goddord had any participation in or control of the operation, conducting or supervising of the escalator."

While it appears to us jurisdiction depends upon the complaint (and not upon a fragment of it), in the absence

of a showing of fraud in joining a stranger to the issue for the purpose of defeating the right of the real defendant to a trial of the issue in the United States courts, because authorities as to fraud cited in the petition, it should be said that the record shows that Mr. Goddord was the "floor man" [R. p. 58]: that he took sole charge of the situation when the child's hand was caught—went for the key, with it stopped the escalator: that there was no other employee of the store present when he so took charge—or that afterwards any other acted [R. p. 60]; that some sales people came later but took no part in the operation of the escalator; that before Mr. Goddord reversed the escalator he was unable to free the hand by pulling upon it [R. p. 52]; that no blood was showing before the reversal [R. p. 61]; that after stopping the machine he again tried to free the hand by pulling on it, but after the reversal the hand came freely away [R. p. 66] with the blood "shooting out" from the severed fingers. [R. p. 51.]

Both the first and second causes of action are based upon the failure of by the defendants to *exercise the degree of care* that the situation required. It is respondent's position that the *management, supervision, operation and control* of an escalator requires the same high degree of care as in the case of an elevator as towards adults—and, as to children, particularly in a situation such as here disclosed, the degree of care required of those controlling, supervising, stopping and starting an escalator, in the course of their employment, and those employing them is even higher; as greater precautions against the injury of children are required in a children's clothing department than in other sections of the store not so frequented by children.

Fundamentally it is the petitioner's position, as we understand it, that the first cause of action is predicated upon the mere existence in the store of an escalator, and as only the owner provided the machine he only may be sued and that the owner's liability is to be tested by the elements required in order to permit a recovery under the doctrine of attractive nuisance. Petitioners in their brief asserted that it must be shown that child was a *trespasser;* that the instrumentality was artificial and uncommon, that the child was *attracted to the premises* by childish curiosity and desire to play with *the machine.* These elements of the attractive nuisance doctrine, including holding that the child must be attracted to the premises by the instrumentality, are referred to in the opinion of the trial court.

If, after the close of business, the store had been left open and the child had been attracted to the third floor of the store by the dead escalator, and had been injured by that stilled escalator, in the absence of Mr. Goddord, the authorities relied upon by petitioners would be in point, for then only the owner of the escalator could be charged. However, it is obvious that if the escalator were not in motion, it would not be any more dangerous than any other stairway, and the mechanics of attraction we could not explain.

In the plaintiff's complaint, the fact that a moving stairway (so different from stationary stairs to which children are accustomed in their own homes—as Judge Denman observed on the oral argument herein), is attractive to children, is alluded to, not for the purpose *of basing recovery on the doctrine of attractive nuisance as it is defined and limited in the books,* but because that attractive-

ness, *only existing when the machine is in motion,* was an element bearing upon the degree of care required to protect children.

Plaintiff's injuries were not the result of a trespass induced by the attraction of an unattended dead escalator, but did come, we assert, from lack of care in the control, management and supervision of the *escalator in motion* in the children's clothing department of a store; and this suit is brought against the owner of the escalator, who is also the employer of the "floor man," the man solely in charge, who, acting in the course of his employment, took charge of the escalator and was the sole human actor at the time the child's fingers were destroyed.

Under the California law the liability for tort is joint and several. The plaintiff chose to charge both employer and employee. It is said that more emphasis has been placed upon the negligence of the May Company. Obviously failure to charge Mr. Goddord might be seized upon as an admission that no one was negligent. We rather think it would be.

As has been suggested, though there are counts in the complaint, the first two relate to the identical injuries and seek the same damages. This is not a suit for $15,000.00 on the first count plus $15,000.00 on the second.

The sufficiency of the pleadings is a matter of California law. It is well established that negligence may be alleged in general terms.

Roberts v. Griffith Co. (1929), 100 Cal. App. 456, 280 Pac. 199.

The effect of this rule is to make admissible in evidence any and all testimony which would tend to prove the allegation of negligence.

Carnahan v. Motor Transit Co., 65 Cal. App. 408 (288 Pac. 145).

"It is settled we think beyond question in this State that the doctrine of *res ipsa loquitur* applies when negligence is pleaded both generally and specially."

McComas v. Al. G. Barnes Shows Company, 215 Cal. 685, 12 Pac. (2d) 685.

In alleging negligence under the California law, it is not necessary to allege the conclusion of law that the defendants or either of them owed a duty to the plaintiff. It is proper to allege the facts out of which the duty arises. The defendant Goddord assumed, in the course and within the scope of his employment, the sole management, control and operation of the escalator, and it was not necessary to allege that he and his employer owed to the plaintiff the duty to exercise care or to define the degree of care in its operation by him. The law imposes the duty.

Obviously, we repeat, petitioner is in error in identifying the action as based on the theory of attractive "nuisance." An escalator is not dangerous when it is not in motion. Still, it is a stairway like other stairways, less dangerous, as it is narrow and it's protecting walls have hand railings.

In action, it is attractive and dangerous, as the maimed hand of the child demonstrates and when it is in use—though in a children's clothing section of a metropolitan department store—care adequate to the situation must be taken.

Under the California law, the degree of care is for the jury, even if there be no conflict in the evidence:

In *Malone v. Clemow*, 111 Cal. App. 13 (295 Pac. 70), it is said:

> "Generally speaking, the degree of care required under any given circumstances is a question of fact for the court or jury, and is not a question of law. *This is true even where there is no conflict in the evidence, if different conclusions upon the subject can rationally be drawn therefrom. If the conceded facts are such that reasonable minds might differ on the question as to whether or not one was negligent, the question is one of fact for the jury, or the court sitting without a jury. These rules are so well established as to render citation of authority unnecessary.*"

The substance of the foregoing excerpt was repeated with approval in *Goodwin v. Goodwin*, 5 Cal. App. (2d) 644-646 (43 Pac. (2d) 332).

The petitioner's theory that the first count does not state a cause of action against the May Company, is not referred to in the petition.

The plaintiff's case and the child has but one case: he asks for $15,000.00—no more. The same injuries, the same defendants are named in both counts, and both counts are based on the fact that he was injured by a moving machine, and the storekeeper and its servant who

handled the machine and set it in motion when it destroyed his fingers were guilty of negligence—joint and concurrent.

The text of Corpus Juris, Vol. 45, p. 771:

> "Where *no trespass* is involved, the attractive nuisance doctrine is not applicable, but the right to recover for injury is based on *different principles.*"

Without the attractive nuisance theory (aside from the fact that the second count is for the same injury, for the same and not additional damages, against the same defendants—and the California rule that if one count is erroneously stricken, it is error without prejudice; if under the remainder of the complaint, full proof may be made), the whole argument of the petition falls.

The matter presented under Point 3 of the petition makes relevant the law of California as to proof.

Briefly the position of respondent at the trial, and now, is that the plaintiff made a *prima facie* case which required an explanation from the defendants—and if the explanation had been made, the inferences as to care and negligence were for the jury.

The doctrine of *res ipsa loquitur* applied to the situation and was available under the pleading.

These facts do appear. A four-year-old boy went with his mother to the children's clothing department of the May Company, the mother having business with the store in exchanging a suit for another child. The little boy

went in with five fingers; he came out with two largely destroyed, and those fingers were destroyed by an escalator owned and operated by the May Company.

Such an incident calls for an explanation by the owner of the machine. It is true that the burden of proof rests on the plaintiff to establish negligence of the defendants, but in the absence of an explanation, an *inference arises that* the defendants were negligent.

In *May Department Stores v. Bell*, 61 Fed. (2d) 830, at page 834, the court say (italics ours):

> "Perhaps the most quoted, simplest and best statement of the law with reference to the application of the maxim, *'res ipsa loquitur'* is that of Chief Justice Erle in Scott v. The London & St. Katherine Docks Co., 3 Hurlst & C. 596, 159 Eng. Reprint 665. The accident out of which the case arose was the falling of six bags of sugar from the defendant's warehouse upon the plaintiff. In holding the question of negligence was for the jury, the court said (page 601 of 3 Hurlst & C.): 'There must be reasonable evidence of negligence. *But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the* accident arose from want of care.'"

The Rule is stated at 20 *R. C. L.*, p. 156, in the following language:

> "More precisely the doctrine of *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is

such as in the ordinary course of events does not happen if due care is exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery *in the absence of any explanation* by the defendant tending to show that the injury was not due to his want of care."

In the instant case, there was no explanation by the defendants. The motion for a nonsuit was a declination to explain. Note the difference in the last cited case; 61 Fed. at page 833:

> "The *chief engineer* of the Famous & Barr Company testified that there were in the store ten escalators under his supervision; that these escalators were purchased from the largest manufacturer in the country; that there was an inspection of the escalator at different times each day, one in the morning about the time the store opened, again in the afternoon toward the close: that *his foreman* makes an inspection throughout the day, and that in going to and from the floors they ride the escalators and see if they are in running condition; that if they find anything wrong with any escalator, it is immediately shut down and taken out of service; that *at the head of each escalator there is some one to watch its operation and the passengers; that at the time of the accident there was some one in attendance;*" . . . etc.

In the above cited case the doctrine of *res ipsa loquitur* was applied.

Cookson v. Fitch, 116 Cal. App. 544 (3 Pac. (2d) 27);

Vertson v. Los Angeles, 116 Cal. App. 114 (2 Pac. (2d) 627);

Ellis v. Jewett, 18 Cal. App. (2d) 629, 64 Pac. (2d) 432.

Authorities Cited by Petitioner.

We have examined with interest authorities cited by the plaintiff, and would call attention to certain features of some of them which make them inapplicable to this case. With the theory that it ought to be the law that if a separable controversy is removed the entire case should be removed; and, that the same rule should be applied to actions originally commenced in the federal court as to those in the state court, we have no quarrel.

We think that petitioner has failed to recognize the distinction that exists between tort cases, in which the plaintiff has the right to determine who is an indispensable party, by suing the tort feasors jointly or separately, and actions in which the right of election does not exist. Further, we think petitioner confuses separate controversies with separate defenses; and, ignores the rule that where there are separate concurrent negligences which may arise to separate defenses, the plaintiff has nevertheless the right to sue jointly the several concurrent tort feasors, and may not be deprived of that right by the defendants.

In the discussion of the *Nester* case, we shall have occasion to refer to the good faith of the plaintiffs in joining Mr. Goddord.

Wecker v. National Enameling & Stamping Co.,
204 U. S. 176, 51 L. Ed. 430.

If the base of the decision were the facts stated by petitioner, there would have been no removal. The removal was ordered because it was proved that the resident defendants were merely draftsmen employed in the office of the company—and the allegations of the complaint connecting them, were false and were *fraudulently* made for the purpose of preventing removal.

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 66 L. Ed. 144, is also a case of fraudulent joinder; and the court held that the fact that a joinder of a resident defendant, fair on its face, is a *fraudulent device* to prevent removal may be shown by extrinsic proof. It was shown.

Clancy v. Brown, 71 Fed. (2d) 210, is also a case of fraudulent joinder; and the court held that the joinder of the resident was *not in good faith*, and the court may go behind the pleadings and if the joinder is a fraudulent device will order removal.

Knight v. Atlantic Coast Line R. Co., 73 Fed. 76. The resident defendant who was joined did not *have any connection* with the incident out of which the damage arose. Clearly he was not a necessary or a proper party, and his joinder was disregarded. The defendant Goddord was the person who, in the course of his employment, was in charge of and personally operated the escalator when the accident occurred. He was charged with the duty of ex-exercising in its operation and its management the degree of care toward the child which the situation required. That was the highest degree of care, and the operator—and the word, though singular, here *includes both defendants*—are responsible for the *"slightest neglect that human care and foresight might have guarded."*

> *Parker v. Manchester Hotel Co.*, 29 Cal. App. (2d) 446, 454, 85 Pac. (2d) 152, 157;
>
> *City of Winfield v. Wichita Natural Gas Co., et al.*, 267 Fed. 47.

The court found that there were separate and distinct causes of action, the determination of neither of which is essential to the determination of the other. In determin-

ing separability in tort cases and the identity of indispensable parties, the rule as to concurrent negligence of master and servant and the right of the plaintiff to elect whether he will sue one or both should be kept in mind.

Macutes v. Cudahy Packing Co., 203 Fed. 291.

In this case there was no allegation of facts showing connection of the resident defendant with event. Mr. Goddord is charged with *misfeasance*, not nonfeasance. It is not necessary to go into liability of an agent for nonfeasance or misfeasance. Failure to take proper care in operating a machine is misfeasance. Goddord was in charge personally and upon him rested the duty of vigilance to see that the child was not hurt. (*Camlon v. Marty*, 98 Cal. App. 598, 277 Pac. 365; *Bush v. Southern Pac. Co.*, 106 Cal. App. 101, 289 Pac. 190; *Gorzeman v. Artz*, 13 Cal. App. (2d) 660, 57 Pac. (2d) 550.)

In Mechem, Agency, 2nd Ed. page 1082, it is said:

> "In actual practice, the liability of the agent or servant is usually ignored, because it is more convenient or effective to pursue the master, but the servant's liability nevertheless exists . . . And so if a servant while driving his master's horse, operating his master's machine, or managing or conducting any other property of his principal over which he has control, so drives or manages as to inflict injury upon third persons under circumstances which would render him liable if he were doing the same thing on his own account, he will be personally liable. In such case the servant, or agent is the actor, and the fact that he is acting for a principal is only the occasion or opportunity for his act, not its justification."

Osborne v. Morgan, 130 Mass. 102;

Floyd v. Shenango Furnace Co. (C. C. Minn.), 186 Fed. 539.

In this case the holding was that the joinder was *fraudulent.*

Certainly the proscribed forms 9 and 10 of negligence under the present rules and the abolition of demurrers, exceptions to the insufficiency of the pleading, lend no support to the petitioner's theory that having "picked" an imaginary "flaw" in the complaint as to the statement of a ground of *concurrent negligence* to which there is a *separate defense,* there is a *separable controversy.*

Nichols v. Chesapeake & Ohio Ry. Co. (C. C. A. 6), 195 Fed. 913.

In this case there were two distinct causes of action: one against the railroad company and its engineer on the theory of joint liability, and the other against the railroad company *alone* for failure to comply with the safety appliance act.

Thomas Boon's Heirs v. William Chiles, et al., 8 Pet. (U. S.) 532, 8 L. Ed. 1034.

"George Boon's heirs were not necessary defendants. They can have no interest in the contest, nor is any decree asked against them"

Armstrong v. La Paz etc. Co. (C. C. A. 9), 107 Fed. (2d) 453.

There can be question as to the right of the plaintiff in a tort action to sue the tort feasors severally, and the defendant has no right to say that the suit must be joint, and it is equally well established that when the plaintiff

elects to sue them jointly the defendant has no right to insist that they shall be sued severally.

> *Western Union Telegraph Co. v. Nester,* 106 Fed. 587, 309 U. S. 582, 84 L. Ed. 960.

In the *Nester* case there was a dismissal in the District Court against the party the presence of whom ousted the federal court of jurisdiction, but not against the party defendant whose citizenship was diverse from that of plaintiff. The appellees in their brief in the Circuit Court of Appeals on the subject of jurisdiction stated that the defendant "Ivie *had been erroneously joined in the suit and that the plaintiff had no intention whatever of securing a judgment against the defendant Ivie, she being merely a formal and dispensable party. She was not a necessary party and had no interest in the litigation other than as a witness.*" (This is a quotation from appellees' response to the Circuit Court's questionnaire on jurisdiction.)

Neither of the parties questioned the action of the court in dismissing against the defendant Ivie. The plaintiff did not appeal from the judgment of dismissal against Ivie.

There was no violation of the rule stated by Justice Gray, quoted in *Alabama G. S. R. Co. v. Thompson,* 200 U. S. 206, 50 L. Ed. 446, 4 Ann. Cas. 1147—at pages 214-215, states the rule clearly:

> "It is well settled that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all of them jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they

> file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, *'a defendant has no right to say an action shall be several which the plaintiff seeks to make joint.* A separate defense may defeat a joint recovery, but it *cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way.'* The cause of action is the subject matter of the controversy, and *that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings."*

As the situation was when the question of jurisdiction was presented to the Circuit Court, the action of the court and the acquiescence therein by the plaintiffs, and the response by plaintiffs to the court's questionnaire above stated, were, we suggest, considered the equivalent of a dismissal by the plaintiffs on their own motion of the suit in the District Court against a joint and several tort feasor.

It may be observed that the attorneys who instituted this suit were the attorneys for the plaintiffs in the *Nester* case. There can be no question of their good faith. They certainly did not join Mr. Goddord for the purpose of preventing a removal to the federal court. *They filed this suit in the federal court.* In the *Nester* case, the Circuit Court of Appeals questioned, at its own instance, the jurisdiction and issued the questionnaire to counsel. At the time that was done the instant case had been tried. Everyone had carried on in good faith. The question having been raised in the *Nester* case, it became apparent to counsel that there was jurisdictional defect in this case; and

at the suggestion of counsel who had brought this suit, a motion *to quash all proceedings* that had been had and for dismissal was made.

Pullman Co. v. Jenkins, 305 U. S. 534, 83 L. Ed. 334.

This case is one of the two principal authorities upon which the Circuit Court based its decision herein. Petitioner tries to distinguish it, but we submit it fully sustains the Circuit Court.

This case states clearly the rule applicable to the present situation, at p. 538:

> "This rule is applied where a non-resident employer and its resident employee whose negligence caused the injury are sued jointly;" . . .

citing, in addition to authorities elsewhere referred to herein: *Chesapeake & O. R. Co. v. Dixon,* 179 U. S. 131, 139, 45 L. Ed. 121, 125; *Chicago, R. I. & P. R. Co. v. Dowell,* 229 U. S. 102, 111-113, 57 L. Ed. 1090, 1095, 1096.

Wilson v. Chevrolet Motor Co. (C. C. A. 8th), 68 Fed. (2d) 686, 689;

Harrelson v. Missouri P. Transp. Co. (C. C. A. 8th), 87 Fed. (2d) 176, 177.

And, at p. 547:

> "It is immaterial that the liability of the master and that of the servant *proceed on different grounds. Even more distinct were the bases of liability* of the lessor and lessee railroad companies in Chicago, B. & Q. R. Co. v. Williard (220 U. S. 413, 55 L. E. 521; 31 S. Ct. 460), where the lessor was held on its obligation to the public, of which it could not be relieved by virtue of a lease."

The Test of Separable Controversy.

A case in some respects similar to this is *Hay v. May Department Stores Co.*, 271 U. S. 318, 70 L. Ed. 965.

In this case the theory was presented that where in a suit for personal injuries against two defendants each is charged with *separate and distinct acts of negligence* some of which affect only the nonresident defendant and others only the resident defendant, no joint cause of action is presented, and a separable controversy is presented. In support of that proposition, the counsel for appellant cited a number of federal cases (319), *all of which* are referred to in respondent's petition.

At p. 321, the court say:

> "It is well settled by the decisions of this Court, that an action brought in the State court against two defendants jointly, in which the plaintiff states a joint liability arising out of *concurrent negligence* of the defendants, does not present a separable controversy authorizing the removal of the case to the Federal court, even if the plaintiff might have sued the defendants separately, the allegations of the complaint being decisive of the nature of the controversy in the absence of a showing that one of the defendants was fraudulently joined for the purpose of preventing the removal."

In the case of *Venner v. Southern Pac. Co.*, 279 Fed. 832, there is a definition of separable controversy and a discussion of the case of *Greer v. Matheson*, cited by petitioner and attention was directed to the rule in suits against joint tort feasors.

At page 838, the court say:

"It is said by counsel that the Greer case has not been followed by the Supreme Court in later cases in that Court. It is pointed out that in Cincinnati, New Orleans & Texas Ry. Co. v. Bohon, Admr., *supra*, Mr. Justice Day said:

" 'A separable controversy must be shown upon the face of the * * * declaration, and * * * defendant has no right to say that an action shall be separable which the plaintiff elects to make joint.'

"But that was an action against joint tort feasors, where the plaintiff had the right to sue both defendants jointly, and in that class of cases there is, of course, no right of removal."

Southern Ry. v. Miller, 217 U. S. 209, 54 L. Ed. 732;

Alabama & Great Southern Ry. Co. v. Thompson, 200 U. S. 206;

Fraser v. Jernson, 106 U. S. 191, 27 L. Ed. 131;

Rose, Federal Jurisdiction & Procedure, Sec. 396.

In *St. Louis Ry. Co. v. McBride*, 141 U. S. 127, it is said:

"Whether on the facts stated in the complaint the plaintiff had a cause of action against the defendant were questions entering into the merits of the controversy, and not matters affecting the jurisdiction of the court."

We also refer to:

City of Bellaire v. Baltimore & Ohio Ry. Co., 146 U. S. 117, 36 L. Ed. 910;

Torrence v. Shedd, 144 U. S. 527, 36 L. Ed. 528; in which case, at p. 530, the court say:

"But in order to justify removal, upon the ground of a separate controversy between citizens of different States, there must by the very terms of the statute be a controversy 'which can be fully determined between them,' and by the settled construction of this section, the *whole subject matter* of the suit must be capable of being *finally determined* between them and complete relief afforded, without the presence of others originally made parties to the suit."

We paraphrase from *Tolbert v. Jackson*, 99 Fed. (2d) 513:

The statute deals specially with a controversy which is wholly between citizens of different states and which can be fully determined between them. 28 U. S. C. A. Sec. 71. The implication is that there must be another controversy in the same suit which otherwise would not be removable. . . . In this case there is but one claim, one ground of suit, one reason for process, one occasion for damages: the loss of the child's fingers. So far as respondent is concerned, there is one action based on the violation of a single right. The resident defendant has a complete common ground of defense with the nonresident defendant. There is no controversy between citizens of different states that can be fully determined between them. No cause of action arose until the accident happened. All elements and amounts claimed are common to both defendants and unite the controversy into a joint cause of action

at the option of the plaintiff. If separate suits were filed, there could be but one recovery awarding full damages, and a partial recovery would have to be credited on any subsequent suit for damages. What the respondent wants is not partial relief but full compensation, and the remedy she seeks requires the presence of both tort feasors.

Perhaps there is no more succinct statement of the test as to separable controversy than is found in *Chicago, Rock Island & Pac. Ry. v. Schwyhart* (227 U. S. 184, 57 L. Ed. 473), at page 194:

> *"On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment and whether there was colorable ground for it when the removal was denied. We are not to decide whether a flaw could be picked in the declaration on special demurrer."*

We think it clear to the point of demonstration that this case does not contain a separate controversy of which the federal court has jurisdiction, plaintiff having elected to sue the master and the servant jointly.

Conclusion.

In *Olson v. Jacklowitz*, 74 Fed. (2d) 718, at p. 719, it is said:

> (2-4) "The suit as brought was not within the jurisdiction of the District Court. The only possible ground of such jurisdiction was diversity of citizenship, and the complaint itself showed that the plaintiff and one of the two defendants alleged to be joint tort-feasors were residents of the same State. That allegation,—and ever since Strawbridge *et al.* v. Curtis *et al.*, 3 Grand. 267, 2 L. Ed. 435, the law has been

too well settled on this point to leave the question of jurisdiction even debatable."

"Nor did the appellant acquire any rights by virtue of a so-called trial on the merits in a court which had no jurisdiction."

The Circuit Court referred in its opinion to the case of *Dollar S. S. Lines, Inc. et al. v. Merz,* 68 Fed. (2d) 594, in which the court held that diversity of citizenship must exist as to all parties where liability for tort is joint and several, and *not merely as to indispensable parties.* Attention is directed to the discussion concerning indispensable parties and the authorities cited. Petitioners in their brief seem to have overlooked this rule.

At page 594, the court say:

"Both parties, however, ask that if the defect in jurisdiction can be cured in this Court this should be done, and that the case be then disposed of on the merits."

In the *Dollar* case, the court concluded (p. 597) that it would be "unwise, if not improper, to consider the assigned errors."

We have, and so stated on argument in the Circuit Court of Appeals, have filed an action in the state court. It has remained inactive. It is not unlikely that before this litigation ends, a decision on the merits by an appellate tribunal will be sought. A ruling on the merits in this court would expedite justice.

We would welcome such a ruling and there was nothing which occurred during the argument before the judges of the Circuit Court of Appeals, upon which petitioners' expression of confidence of the affirmance of the decision of the District Court is based. If the case were sent down with directions as was done in the *Dollar* case, we would not exercise the option to dismiss in the District Court against the resident defendant.

As we are convinced that the only result of a review of the decision of the Circuit Court of Appeals would be an affirmance of its conclusion that no jurisdiction exists, we respectfully submit that the petition should be denied.

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